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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RYAN W., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DAVID W. , Appellees.	2 CA-JV 2008-0100 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18713800

Honorable Peter W. Hochuli, Judge Pro Tempore

REVERSED

Jacqueline Rohr
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Appellant Ryan W. is the father of David W., who was born in April 2008. Ryan challenges the juvenile court's September 2008 order adjudicating David dependent. The Arizona Department of Economic Security (ADES) concedes the court erred and agrees with Ryan that the evidence was insufficient to prove David was dependent as to Ryan at the time of the dependency adjudication hearing. Because our independent review of the record supports the parties' assertions that the evidence was insufficient, we reverse the adjudication of dependency.

¶2 The definition of a dependent child includes one adjudicated to be "[i]n need of proper and effective parental care and control and who has no parent or guardian . . . willing to exercise or capable of exercising such care and control." A.R.S. § 8-201(13)(a)(i). "If, at the dependency adjudication hearing, the court . . . [f]inds by a preponderance of the evidence that the allegations contained in the petition are true, the court shall" find "[t]hat the child is dependent." A.R.S. § 8-844(C)(1)(a)(iii). The burden is on the state to prove the child is dependent. *In re Maricopa County Juv. Action No. J-75482*, 111 Ariz. 588, 593, 536 P.2d 197, 202 (1975).

¶3 We view the evidence in the light most favorable to sustaining the juvenile court's findings, *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994), and will not disturb a dependency adjudication unless no reasonable evidence supports it, *In re Maricopa County Juv. Action No. JD-500200*, 163 Ariz. 457, 461, 788 P.2d 1208, 1212 (App. 1989). "'The primary consideration in a

dependency case is always the best interest of the child.'" *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005), *quoting Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994).

¶4 The dependency petition filed in June 2008 alleged, and the evidence established, that David was born prematurely with multiple medical needs; he underwent two surgeries and was hospitalized in intensive care for two months. David's mother, Anne, is an alcoholic, who had previously been treated for her alcoholism but had relapsed and was drinking again between 2006 and 2008.

¶5 When Ryan and Anne married in October 2006, less than two months after they had met, Ryan was initially unaware that Anne had at least a ten-year history of alcoholism. He began to recognize the severity of her drinking problem only after they had been married for several months.

¶6 In December 2007, when they learned of Anne's unplanned pregnancy, Ryan was concerned about the effects of her drinking while pregnant. He discussed his concerns with Anne; "completely stopped buying alcohol"; "got rid of all of it in the house"; denied Anne access to his bank account and credit cards; urged her to seek help, either in "[r]ehab, A[lcoholics] A[nonymous]" (AA) or by "speaking to her doctor about it"; and "arranged for counseling for her through [his] insurance." Anne refused to enter a "rehab program" but claimed she would attend AA meetings.

¶7 As she later implicitly admitted, Anne continued to drink until David's premature birth in April 2008. When it was time for David's discharge from the hospital in June, although Ryan was under the impression that Anne had stopped drinking, she admitted having consumed alcohol as recently as two days earlier. As a result, when David was discharged on June 10, ADES took him into protective custody, placed him in the temporary physical custody of Anne's mother Jayne, and initiated this dependency proceeding.[1]

¶8 After a discontinuous dependency hearing held over four days in September 2008, the juvenile court found by a preponderance of the evidence that the pertinent allegations of all three dependency petitions—the original and both amended petitions—were "true." Although sufficiently proving the allegations had been true when the petition was filed in June, the evidence also established that Ryan had made numerous changes between the filing of the petition and the conclusion of the dependency hearing. Indeed, ADES asserts in its answering brief that Ryan "had remedied the allegations in the dependency petition by the conclusion of the contested dependency hearing."

¶9 The pertinent allegations of all three dependency petitions were these:

> The father has not taken steps to protect his son from the mother's drinking. He also knew the mother was drinking while

[1]Soon afterward, Anne entered a long-term residential treatment program in Tucson. Ryan testified that, upon her anticipated discharge in mid-September, Anne would move into transitional housing "where she w[ould] continue her sober living and work at the job that she has and continue her visits with David." David was adjudicated dependent as to Anne on July 30, 2008, based on her admission that "[her] abuse of alcohol precludes her from parenting the child at this time."

> pregnant. The father has not been consistent with his visits to his son and is not well-bonded despite having six weeks of paternity leave from his job. He now has returned to work and is not able to monitor his son's safety.

¶10 Virtually without contradiction, the evidence established that, after the dependency petition was filed, Ryan had, indeed, taken steps to protect David from the effects of Anne's drinking. For over two months, from the time he got off work in the evening until the next morning, Ryan had been competently caring for David overnight. The ongoing case manager agreed with the statement that, after David's discharge from the hospital, Ryan's "time and ability to be with his son changed dramatically" and he had "spent as much time as possible" with David since then. Ryan had sought private counseling in which he had been addressing his dependency and co-dependency issues, and he had learned more about alcoholism: he had done considerable online research; had attended several meetings with Al-Anon, a support group for families of alcoholics; and testified that, although he had not liked the meetings he had attended, he was willing to attend others. He had also obtained an order of legal separation, which included a parenting plan that both Anne and Ryan had signed. It placed David in Ryan's sole custody and gave Ryan discretion over whether and when Anne could have supervised visitation with David.

¶11 Besides Ryan, only three other witnesses testified at the dependency hearing: the investigative case manager, whose involvement with the case had ended approximately when David was discharged from the hospital in June; the ongoing case manager; and Ryan's mother-in-law Jayne, with whom David continued to be placed. Of the three, it was Jayne

who expressed the greatest concern that Ryan did not fully understand Anne's alcoholism "and how she operates" and did not yet "ha[ve] the tools in place to be able to deal with her." According to Jayne, "Ryan was [not] in the place where he could protect the baby from the mother" because, Jayne believed, "Ann[e] causes [Ryan] to do things that aren't in his best interest." In Jayne's opinion, Anne "is still too much of a[n] influence in [Ryan's] life and he's going to make that judgment when it comes to his son's safety."

¶12 Although Jayne was allowed to state her opinions without objection by Ryan's counsel, she was plainly testifying only as a lay witness, not as an expert. The state presented no expert testimony and did not call Ryan's therapist as a witness, having instead apparently elected to rely primarily on the case manager's testimony.

¶13 Case manager Kristen Olsen testified she had made Ryan's therapist aware of the issues he needed to work on. Olsen agreed that she was "basically . . . satisfied with the treatment . . . or the therapy that he was receiving." Based on the reports she had received about his therapy, Olsen had neither made any changes to Ryan's case plan nor recommended he see a different therapist. She acknowledged that Ryan is now both "very bonded" and committed to David and able to care for him physically. She further acknowledged having no reason to believe Ryan had allowed Anne to be around David since the baby's discharge from the hospital in June.

¶14 Asked what further steps Olsen wanted to see Ryan take before she would recommend dismissing the dependency action, Olsen answered:

I would like him to actively participate in Al Anon and get the full benefit of actively participating. I would like to see more notes from the therapist indicating that she feels that he has made significant progress on the issues. I recently asked the therapist to talk with the maternal grandmother to get some background information about the history of Ryan and Ann[e] and his enabling her and recently the therapist did do that. So I would like to see what comes up from that in the therapy. I would like to see some—Ann[e] get out on her own and see if he's able to keep her away. If she tries to come around, some [sic] just more time to—for him to prove that he is able to stand his ground and not let Ann[e] do anything to endanger David.

¶15 The exchange between Ryan's counsel and Olsen continued:

Q. So, basically, it boils down to the fact that you want him t[o] prove he can stand on his o[w]n to protect his son? Would that be—encapsul[at]e what you really think needs to happen?

A. Sure.

Q. Okay. Do you have any reason to believe that he has not been making significant progress in therapy?

A. I have reason to question that.

Q. What reason do you have to question it?

A. It could be something that the therapist said—I don't know if I can say that.

Q. As a result of some information that you received from the therapist, what changes did you make in the case plan or did you have a follow-up contact with her?

A. Just the request for her to talk with the maternal grandmother to get some more background information.

Q. How long ago was that?

> A. About three, four weeks ago.
>
> Q. You haven't checked back with her since?
>
> A. I've asked her for monthly updates that she sent at the end of the month. I would expect one at the end of September.

During the remainder of that exchange, Olsen acknowledged that the information she wanted Ryan's therapist to acquire from Jayne pertained to the period of time from when Anne was pregnant with David through his birth and hospitalization, not to current circumstances or any more recent events.

¶16 Ruling from the bench at the conclusion of the fourth day of the hearing on September 19, the juvenile court first found that Ryan "has the ability to care for his son" and "has every intention to keep the mother away from their son and to follow the order that's been put in place relative to the legal separation." But, the court continued:

> I . . . do not believe that he has the tools or the ability to protect—to exercise proper and effective control to protect his son from his wife. He's not willing to participate in the Al Anon program. And I don't find fault for his not willing [sic] t[o] participate in Al Anon. I'm pleased with his work on the internet to get information and that's certainly admirable, but the Court believes that without actual conversations face to face with others that have experienced all the "tricks of the trade of the alcoholic," which Al Anon or a similar program or even counseling with someone who's worked with people that have spouses that are alcoholics[—]that is gonna take some time for him to experience the tricks and lies that an alcoholic will put forth.

¶17 After making further findings concerning Ryan's actions before and around the time the dependency petition was filed three months earlier, the court stated it "d[id] not believe [Ryan] has all the necessary tools now to effectively parent and exercise control over others to protect his child." It thus found the allegations of the dependency petitions had been established by a preponderance of the evidence and adjudicated David dependent as to Ryan.

¶18 As ADES notes in its answering brief, the juvenile court's ruling did not acknowledge that Ryan had been participating in individual therapy to learn about Anne's alcoholism and to address his own dependency issues. Because ADES had not called Ryan's therapist to testify at the hearing, there was no direct evidence to establish either his progress or lack of progress in therapy and no indication whether Ryan's therapist is "someone's who's worked with people that have spouses that are alcoholics." The court's stated belief that Ryan could not protect David adequately "without [having] actual conversations face to face with others that have experienced all the 'tricks of the trade of the alcoholic'" simply finds no support in the record. And its finding that Ryan did not currently have the tools or the ability to protect David from Anne rested almost exclusively on the opinion testimony of Anne's mother, whose qualifications to offer such an opinion were not established and whose interests in David's placement may arguably have been adverse to Ryan's. *Cf. In re Arrick*, 180 Ariz. 136, 142, 882 P.2d 943, 949 (1994) (illustrating use of expert testimony on issue of sober alcoholic's likelihood of relapsing).

¶19 The evidence did amply establish David's dependency in June 2008 when the initial petition was filed. But § 8-844(C)(1)(a)(iii) is phrased in the present tense, requiring the juvenile court to find that "the allegations in the petition *are* true" and that "the child *is* dependent." (Emphasis added.) Ryan presented considerable evidence of changed circumstances as the result of the efforts he had made since June to comply with the requirements of his case plan and rectify David's dependency. The state failed to present any competent evidence that Ryan remained unable to provide effective parental care and control of David. *See Maricopa County No. J-75482*, 111 Ariz. at 593, 536 P.2d at 202 (burden of proof on state).

¶20 Having reviewed the record in depth, we agree with both parties that the evidence was insufficient to prove, even by a preponderance, § 8-844(C)(1), that David met the definition of a dependent child on September 19, 2008. The adjudication of dependency is, therefore, reversed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge